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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, being entirely in the dark and not informed as to why or for what reason this court denied its petition, believes that petitioner either failed to clearly state the grounds or reasons for this court's jurisdiction, or that this court overlooked or misapprehended certain material matters therein contained.

Petitioner therefore presents this petition for a rehearing of its original petition for writ of certiorari within the time provided by the rules of this court for the filing thereof. This court denied petitioner's original petition October 13, 1947. Petitioner adopts and makes a part hereof said original petition and supporting brief.

I.

The question as to whether petitioner, a market agency, a national public utility, can be held liable in conversion for receiving and selling stolen or mortgaged property without having knowledge that the property is stolen or mortgaged or of any fact to place it upon inquiry at the time it is rendering its services and before it completes the same, presents an important federal question for the determination of this court. It presents a question that petitioner and all similar market agencies, national public utilities, are entitled to have determined by this court at this time.

The enactment and enforcement of the Packers and Stockyards Act converted petitioner from the status of a private agency to that of a national federal public utility. This is settled beyond peradventure by decisions of this court and other federal tribunals.[1] This was conceded by the opinion of the majority of the Supreme Court of Iowa.

Petitioner and all other market agencies, livestock commission merchants, must serve all comers promptly and without discrimination. Petitioner cannot require of one shipper, patron, or customer evidence of such shipper's title, ownership, right and authority to sell the livestock that it does not require of all of its shippers, patrons and customers. It must serve all alike. Petitioner cannot charge one shipper, patron or customer for services one penny more than it charges other customers, patrons or shippers. It cannot charge a shipper, customer or patron for its services more than the maximum amount fixed and determined by the Secretary of Agriculture as a proper charge for such services. Petitioner cannot refuse to render its services to any shipper of livestock unless at the time it makes such refusal it has knowledge of facts which furnish a proper basis and reason to protect it in so doing.

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[1] See authorities cited and discussed in our original brief, pp. 15-19, incl.

Petitioner procured its authority to act as a market agency by virtue of being registered with and licensed by the Secretary of Agriculture under the Packers and Stockyards Act. Petitioner is in no way operating as a market agency or otherwise under any law of the state of Iowa.

Petitioner, in rendering the services which it did to fictitious Brainman, acted honestly and in good faith and without knowledge of respondent's claimed rights, and did nothing more than it was required to do as a national public utility under the federal law. On the other hand, respondent was under no such legal obligation under the federal law or otherwise to sell his cattle to fictitious Brainman. At all times respondent was free to sell his cattle to whom he pleased, when he pleased, and upon such terms and conditions as he pleased.

The prompt accounting to the shipper, Brainman, for the proceeds derived from the sale was one of the necessary duties imposed upon petitioner by the federal statute and the exclusive federal control and regulation of the markets.

Certainly no one can contend, at least not successfully, that the Federal Government, by the Act in question and the construction thereof given to it by this court and other federal tribunals, did not take over the entire field of regulating and controlling the marketing of livestock in this nation.

It has always been the law of this nation (with the exception hereinafter referred to), settled by a long line of judicial decisions, that a public utility which, without knowledge and in good faith, renders its services to a person wrongfully in possession and without authority, cannot be held liable in conversion for rendering services pertaining to stolen or mortgaged property.[2]

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[2] See authorities cited and discussed in our original brief, pp. 13-26, incl.

The exception referred to started with the case of *Mason City Production Credit Association* v. *Sig Ellingson and Company,* 205 Minn. 537, 286 N.W. 713, in which this court denied a petition for writ of certiorari (308 U. S. 599, 84 Law Ed. 501; 308 U. S. 637, 84 Law Ed. 529). Thereafter the Supreme courts of the states of South Dakota and Washington,[3] without any independent or original consideration or discussion whatsoever, followed the Minnesota case *entirely* because this court denied the petition for writ of certiorari, thereby evidently erroneously believing that this court, by denying the writ of certiorari, approved and affirmed the decision of the Supreme Court of Minnesota.

The majority of the Supreme Court of Iowa, evidently laboring under the same belief, rendered the decision in the case at bar of which complaint is made (26 N.W. (2d) 39-46, incl.). A denial of the writ in the case at bar may cause the courts of other states not having previously passed upon the question, to commit the same error.

The four dissenting members of the Iowa Supreme Court, believing the decisions of the Supreme courts of the states of Minnesota, South Dakota and Washington were erroneous, filed a learned dissenting opinion written by Justice Smith, in which the minority were of the opinion that the law which has always been the law of this nation should be followed.

The courts of Missouri, in the case of *Blackwell* v. *Laird, et al,* 236 Mo. App. 1217, 136 S.W. (2d) 91, refused to follow these decisions and determined the law of Missouri to be as contended by petitioner and as set forth in the dissenting opinion of Justice Smith in the case at bar.

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[3] First National Bank of Pipestone v. Siman, et al, 67 S. D. 118, 289 N. W. 416; Moderie v. Schmidt, 6 Wash. (2d) 592, 108 Pac. (2d) 331.

The trial courts of two other states where the question has been presented refused to follow the *Sig Ellingson* case, as did the trial court in the case at bar, but on the contrary followed the *Blackwell* case, which is supported by this long line of authorities.

The majority of the Supreme Court of Iowa and the Supreme courts of Minnesota, South Dakota and Washington recognized that petitioner and all other market agencies were converted by the Act in question into national public utilities, required to carry out and perform all the burdens, duties, regulations and responsibilities of a public utility, but held they were entitled to no rights, benefits, privileges, exemptions and immunities enjoyed by all other public utilities of the nation on account of the nature of their compulsory services.

These decisions were based on the premise that there was no provision in the Packers and Stockyards Act expressly granting petitioner any of such rights, privileges, exemptions and immunities. Petitioner bases its claimed rights, privileges, exemptions and immunities not on any particular provision of the Packers and Stockyards Act, but entirely upon the fact that the Act converted petitioner from the status of a private agency to that of a national public utility.

Certainly Congress, much experienced in this field of legislation, knew all of the burdens, duties, regulations and responsibilities it was placing upon petitioner and all other market agencies by converting them into national public utilities. Likewise Congress knew of the benefits, privileges and immunities to which all public utilities, on account of the compulsory nature of their services, were entitled. If Congress desired to even attempt to deny market agencies these benefits, privileges, exemptions and immunities, it would have found words to have so provided.

The Supreme Court of Iowa was not content to simply hold that petitioner, a public utility, was not entitled to such rights, privileges, exemptions and immunities, but went further and held that petitioner became the guarantor of the honesty and integrity of those whom it was thus compelled to serve, and became an insurer of the title to the livestock it was thus compelled to promptly receive and sell.

The majority of the Supreme Court of Iowa went still further—it required petitioner to become an insurer of all livestock dealers against loss incurred by their own bad judgment, as well as their own culpable and wilful negligence. This is necessarily true because it is without dispute in the record that respondent delivered both title and indicia of title and possession to fictitious Brainman, believing he had been paid for the livestock (R. 17). It is common knowledge that respondent could have averted the entire loss by a telephone call, at a cost of probably not to exceed sixty-five cents, to ascertain the validity or value of the check.

Petitioner is claiming a right, privilege, exemption or immunity under a statute of the United States, as well as under the exclusive authority exercised by the United States, in controlling petitioner and other market agencies engaged in the marketing of livestock. Certainly this presents a federal question which is the duty of this court to review under subparagraph (b) of Section 237 of the Judicial Code, which is also Section 344 of Title 28, U.S.C.A.

This federal question is most vital to petitioner and all other market agencies. Upon its proper disposition rests entirely the future of market agencies. Were the law announced by the Supreme Court of Iowa to become the national law, the unknown hazards to which market agencies

would be subjected would present to anyone a permanent bar and barrier to engage in that business. The liability of petitioner and all other market agencies could never be determined after receiving and selling livestock until the expiration of the statutory period of limitations for a suit in conversion. It would be too late to lock the door after the horse had been stolen. Many market agencies could be driven out of business after they had been rendered insolvent by such a harsh, unjust rule of law.

This federal question is being decided differently by different states of the Union, with the result that the liability of a market agency can vary with as many states as there are states in the Union. It is a federal question that should, therefore, be decided and set at rest by a decision of this court at this time.

II.

Petitioner, by the decision of the majority of the Supreme Court of Iowa, has been denied its right and guarantees under the federal constitution. This decision likewise unduly burdens interstate commerce, in violation of the commerce clause.

The majority opinion of the Iowa Supreme Court clearly recognized the law to be that all other public utilities engaged in the same current of commerce, where they innocently and without knowledge rendered their services in the handling of stolen or mortgaged livestock, were exempt from liability for conversion on account of the compulsory nature of their services. At the same time, and in the same breath, that court held that petitioner, a national public utility, under like circumstances was not exempt from such liability, although it was under like compulsion to render its services in the same current of commerce. This clearly denied your petitioner the equal protection of the law guaranteed by the Fourteenth

Amendment to the Federal Constitution. This is fully covered in our original brief, pages 32 to 40, inclusive.

The Packers and Stockyards Act was clearly enacted to make free and unburdened the flow of livestock through the centralized markets. The true effect of the decision of the Iowa court is to unduly and unlawfully burden that flow of commerce. See our original brief, pages 40 to 43, inclusive.

Petitioner seeks not to invoke the jurisdiction of this court because the decision of the majority of the Supreme Court of Iowa was grossly erroneous; petitioner seeks to invoke the jurisdiction of this court because the decision of the Iowa court in the light of the compulsion imposed upon petitioner by the Packers and Stockyards Act, was unjust, arbitrary, oppressive, unreasonable and confiscatory, and thus deprived petitioner of its property without due process of law, in violation of the Fourteenth Amendment. See our original brief, pages 43 to 48, inclusive.

Clearly the decision of the majority of the Supreme Court of Iowa violated the Federal Constitution in at least the three above respects.

III.

Where a litigant has, by a judgment of a state court, been denied its rights, privileges, exemptions or immunities granted by federal statute or guaranteed by the federal constitution, it is the solemn duty of this court to take jurisdiction and correct the error.

We attempted to cover this point in our original brief on pages 48 to 50, inclusive.

That this court should grant the writ and take jurisdiction, both because of petitioner's being denied the rights privileges, exemptions and immunities granted and

created by the Federal Statute in question, and because of the violation of petitioner's constitutional rights, is further settled and determined by the decisions of this court in the following cases:

California National Bank v. *Kennedy*, 167 U. S. 363, at 365 and 366; 42 Law Ed. 167, at 199 and 200.

Merchants National Bank of Cincinnati v. *Wehrmann, etc.* 202 U. S. 295, at 299; 50 Law Ed. 1036, at 1039 and 1040.

Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142, at 148; 52 Law Ed. 143, at 146.

Many years ago, this court, speaking through Mr. Chief Justice Marshall, in the case of *Cohens* v. *Virginia*, 6 Wheat (19 U. S.) 264, at 404, 5 L. Ed. 257, at 291, said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

Now here is an inhibition voiced with authority, upon which may be predicated the further statement that the rights of a litigant to a determination of his Constitutional rights, although in review of a state decision, are not alone dependent upon Section 237 of the Judicial Code or Rules of Court made pursuant thereto.

The right to be heard on an issue of this grave import is wider than the Due Process Clause or the Equal Pro-

tection Clause, or the Fifth Amendment or the Fourteenth Amendment, or the Constitution itself. It is broader than all of them. It is as wide as the fundamental Bill of Rights, upon which all free government is erected. The right to be heard when the voice of oppression threatens, is an inherent right of all free men.

CONCLUSION.

In conclusion, we submit that this court should vacate its order of October 13, 1947, denying the original petition, and should grant the writ of certiorari as prayed for in that petition and supporting brief and hear this case on its merits, and reverse the judgment of the Supreme Court of Iowa.

Respectfully submitted,

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I Hereby Certify that the foregoing petition is presented in good faith and not for delay.

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